A

BINA PURI SDN BHD

v.

EP ENGINEERING SDN BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
LOW HOP BING JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-02-26-2004]

C

4 DECEMBER 2007

AGENCY: *Creation - Whether relationship of agency exists - Whether parties to a joint venture agreement can be deemed to be agents for each other - Whether sub-contract entered into by a party to the joint venture*

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with a third party will bind the other parties in the joint venture - Whether ordinary principles of agency are applicable

ARBITRATION: *Agreement - Standard form - Whether agreement to arbitrate must be in writing - Whether agreement to arbitrate must be signed*

E

CIVIL PROCEDURE: *Costs - Getting-up fee - Whether to allow getting-up fee - Getting-up fee for appeal disallowed for successful party who had not raised any argument in appeal - Whether party entitled to out of profit costs and out of pocket expenses*

F

CONTRACT: *Formation - Terms - Incorporation of terms - Express incorporation or incorporation by conduct - Incorporation of a term of one contract into another contract*

G

CONTRACT: *Terms - Arbitration clause - Incorporation of arbitration clause - Whether arbitration clause in sub-contract properly incorporated into settlement agreement*

Malaysia Airlines System Berhad (MASB) awarded a contract for infrastructure works for the building of a cargo complex at Kuala

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Lumpur International Airport to a joint venture constituted between the appellant and the second respondent. The second respondent then through a letter of award awarded the sub-contract for certain works in respect of the cooling system for the cargo complex to the first respondent. The appellant did not sign

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the said letter of award nor was it ever mentioned in that document. Later, disputes arose leading to court proceedings

involving the parties hereto. That litigation was settled and a compromise was recorded in a settlement agreement. The appellant was a party to the settlement agreement and signed it. Later, the dispute was referred to arbitration by the first respondent and reliance was placed on the arbitration clause in the articles of agreement accompanying the letter of award of the sub-contract. The appellant claimed that it was not a party to the sub-contract and therefore not bound by the agreement to arbitrate. The appellant then brought an action for a declaration that it was not bound to go to arbitration with the first respondent. The learned judge dismissed the appellant's application and held that there was indeed an agreement to arbitrate between the appellant and first respondent. The appellant being dissatisfied, appealed against this judgment. The sole issue arising in this appeal was whether the appellant was bound by the arbitration clause in the sub-contract.

Held (dismissing the appeal with costs)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It is settled law that an agreement to arbitrate must be in writing. But it is not the law that an agreement to arbitrate must be signed. Therefore, it was not necessary for the first respondent to produce an agreement to arbitrate that was signed by the appellant. Suffice that there was such an agreement. (paras 5 & 6)

(2) Whether a term or a clause in one contract has been incorporated in another depends on the facts and circumstances of each case. There may be express incorporation or incorporation by conduct. On the present facts, there had been a sufficient incorporation of the sub-contract into the settlement agreement. The arbitration clause in the sub-contract by reason of its incorporation bound the appellant. (paras 9 & 10)

(3) There was an acknowledgment by the appellant in the recitals to the settlement agreement that the sub-contract was entered into by the second respondent on behalf of the joint venture to which the appellant was a party. There was also a strong argument of liability through the application of the ordinary principles of agency, in that the appellant was a partner of the joint venture. (paras 12 & 13)

(4) Since there was really only one argument in this appeal from the respondents and it came from the first respondent, any getting up on the second respondent's bill of costs was disallowed. However, both respondents were entitled to out of profit costs and out of pocket expenses. (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Malaysia Airlines System Berhad (MASB) telah mengawardkan satu kontrak kerja-kerja infrastruktur berkaitan pembinaan satu kompleks kargo di Lapangan Terbang Antarabangsa Subang kepada sebuah syarikat usahasama yang ditubuhkan oleh perayu dan responden kedua. Berikutnya, melalui sepucuk surat, responden kedua mengawardkan sub-kontrak untuk kerja-kerja berkaitan sistem penyaman undara bagi komplek kargo tersebut kepada responden pertama. Perayu tidak menandatangani surat award itu dan tidak juga disebut di dalamnya. Pertikaian kemudian berbangkit di antara pihak-pihak di sini yang membawa kepada prosiding di mahkamah. Litigasi tersebut bagaimanapun telah diselesaikan dan satu kompromi telah direkodkan di dalam satu Perjanjian Penyelesaian. Perayu adalah pihak kepada Perjanjian Penyelesaian dan telah menandatanganinya. Walaupun begitu, responden pertama kemudian telah merujuk pertikaian kepada timbangtara berdasarkan kepada fasal timbangtara seperti yang terdapat di dalam artikel perjanjian yang menyusuli pemberian surat award sub-kontrak. Perayu menuntut bahawa ia bukan pihak kepada sub-kontrak dan dengan itu tidak terikat dengan perjanjian untuk bertimbangtara. Perayu kemudian memulakan tindakan untuk deklarasi bahawa ia tidak terikat untuk mengambil bahagian dalam timbangtara dengan responden pertama. Yang arif hakim menolak permohonan perayu dan memutuskan bahawa memang wujud satu perjanjian untuk bertimbangtara di antara perayu dan responden pertama. Tidak berpuashati, perayu merayu terhadap keputusan. Isu tunggal yang berbangkit adalah sama ada perayu terikat dengan fasal timbangtara di dalam sub-kontrak berkenaan.

Diputuskan (menolak rayuan dengan kos)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

(1) Sudah menjadi undang-undang mantap bahawa suatu perjanjian untuk bertimbangtara mestilah bertulis. Namun, bukanlah menjadi undang-undang bahawa perjanjian untuk bertimbangtara tersebut perlu ditandatangani. Oleh itu, adalah

tidak perlu bagi responden pertama untuk mengemukakan perjanjian bertimbangtara yang telah ditandatangani oleh perayu. Mencukupi jika perjanjian sedemikian itu sahaja wujud.

(2) Sama ada satu terma atau fasal di dalam satu kontrak telah diresap ke dalam kontrak yang lain bergantung kepada fakta dan halkeadaan setiap kes. Mungkin wujud penyerapan secara ekspres atau penyerapan melalui kelakuan. Berdasarkan fakta-fakta kes semasa, terdapat penyerapan yang mencukupi sub-kontrak ke dalam Perjanjian Penyelesaian. Oleh itu, fasal timbangtara di dalam sub-kontrak, berasaskan penyerapan yang berlaku, telah mengikat perayu.

(3) Terdapat perakuan oleh perayu di dalam mukadimah Perjanjian Penyelesaian bahawa responden kedua memeterai sub-kontrak bagi pihak usahasama di mana perayu merupakan pihak kepadanya. Juga terdapat hujah kukuh mengenai liabiliti melalui pemakaian prinsip biasa agensi, dalam ertikata bahawa perayu adalah rakan kongsi usahasama tersebut.

(4) Oleh kerana terdapat hanya satu sahaja hujah responden-responden di dalam rayuan ini dan ianya datang dari responden pertama, maka getting up atas bil kos responden kedua tidak boleh dibenarkan. Bagaimanapun, kedua-dua responden berhak kepada kos dari keuntungan serta belanja hangus.

Case(s) referred to:

Bauer (M) Sdn Bhd v. Daewoo Corp [1999] 4 CLJ 665 CA ***(refd)***
Brian Pty Ltd v. United Dominions Corp [1983] 1 NSWLR 490 ***(refd)***
Canny Gabriel Castle Jackson Advertising Pty Ltd v. Volume Sales (Finance) Pty Ltd [1974] 131 CLR 321 ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 2

For the appellant - Philip Chai; M/s Philip Chai & Co
For the 1st respondent - T Sudhar; M/s Shook Lin & Bok
For the 2nd respondent - Saseedaran Achan; M/s Achan & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R1-24-18-2000]

Reported by Amutha Suppayah

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] Malaysia Airlines System Berhad wanted to build a cargo complex at Kuala Lumpur International Airport, Sepang. That complex needed infrastructure works. On 3 December 1996, Malaysia Airlines System Berhad awarded the contract for the infrastructure works to a joint venture constituted between the appellant and the second respondent in the instant appeal. On 29 January 1997, the second respondent in this appeal wrote to the first respondent. In that letter, it awarded the sub-contract for certain works in respect of the cooling system for the cargo complex in question. The appellant did not sign the said letter of award; nor was it ever mentioned in that document. Later, disputes arose which became the subject matter of proceedings in court. The first respondent before us was plaintiff in those proceedings and the appellant and the second respondent among others were defendants. That litigation was settled. The compromise was recorded in a settlement agreement dated 12 January 1999. Section 1.02 of the recitals to the settlement agreement reads as follows:

> By a letter of intent dated the 11th day of December, 1996 and a letter of award dated the 29th day of January, 1997 both attached hereto as Appendix 1 (hereinafter called the "**Letters**"), KHEC acting on behalf of the JV, awarded a sub-contract (hereinafter called the "**Sub-Contract**") to EP for the execution and completion of the Chilled Water Loop System (hereinafter called the "**Services**"), which forms part of the Works awarded by MAS to the JV, based on the terms and conditions as stipulated in the Letters and in the Standard Form of Contract for Sub-Contracts (hereinafter called the "**Sub-Contract Agreement**") attached hereto as Appendix II.

[3] The appellant was a party to the settlement agreement. It signed it. Later, the dispute was referred to arbitration by the first respondent in this appeal. Reliance was placed on the arbitration clause in the articles of agreement accompanying the letter of award of the sub-contract. The appellant took the point that it was not a party to the sub-contract and therefore not bound by the agreement to arbitrate. The appellant then brought an action for a declaration that it was not bound to go to arbitration with

the first respondent. The learned judge who heard the appellant's summons dismissed it. He held, on the material before him, that there was indeed an agreement to arbitrate between the appellant and the instant first respondent. The appellant being dissatisfied has appealed to this court.

[4] We would be doing no injustice to the submissions of learned counsel for the appellant if we said there was really only one issue in this appeal. That issue is whether the appellant is bound by the arbitration clause in the sub-contract. It is common ground that there is no separate agreement to arbitrate between the appellant and the first respondent. So it is a question of construction having regard to the factual matrix against which this appeal rests whether the appellant is correct in its contention.

[5] Now it is settled law that an agreement to arbitrate must be in writing. Section 2 of the Arbitration Act 1952, the legislation under which this arbitration was proceeding, requires it. But it is not the law that an agreement to arbitrate must be signed. This court had to deal with the identical point in *Bauer (M) Sdn Bhd v. Daewoo Corp* [1999] 4 CLJ 665. This is what the court said in the course of the judgment in that case:

> … The phrase 'written agreement' in s. 2 of the Act does not demand of a formal agreement executed by the parties to the dispute. The agreement to which the section refers may be gathered from either a single document or a series of documents or, in some cases, a party may be estopped from asserting that there is no agreement. This principle is amply covered by authority.

[6] It follows that in the present instance it is not necessary for the first respondent, in order to succeed, for it to produce an agreement to arbitrate that is signed by the appellant before us. Suffice that there is such an agreement. In support of the learned judge's finding, learned counsel for the first respondent has placed reliance on the settlement agreement and in particular s. 1.02 of the recitals which we have already reproduced earlier in this judgment. The submission is that the sub-contract and the letter of award have been incorporated into the settlement agreement. Since the appellant is a party and a signatory to the settlement agreement, it is bound by the arbitration clause in the sub-contract. The appellant however contends that there has been no incorporation in the present case.

[7] Once again, the point which lies at the axis of the dispute was dealt with in *Bauer (M) Sdn Bhd v. Daewoo Corp* [1999] 4 CLJ 665, where at p. 676 it was held as follows:

> We were once again regaled with authorities where a term either was, or was not, held to have been incorporated into a contract by reference thereto in another document. Again, I must say that the cases cited by counsel amount to no more than illustrating the application of a well-established principle to particular fact patterns. Upon the principle there is no dispute. It was stated with clarity by Venkatarama Aiyar J, in *TN Rao v. Balabhadra* 1954 AIR Mad 71 at p 72:
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> > When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into that document and ascertain the terms. An examination of the authorities in which this view has been adopted shows that they are either cases in which the other contract is one between the same parties and therefore the terms including the arbitration clause might be taken to have been within the knowledge of the parties; or cases in which there is a reference to a specific document which was in existence and whose terms could easily be ascertained if the parties wanted to. It is reasonable to hold that when the parties had referred to a document which was in existence they had knowledge or what comes to the same thing, could have had knowledge, of all the terms contained in that document and an arbitration clause contained in that document must, therefore, be held to be binding on them exactly as if it had been incorporated in extenso in the signed contract. The foundation of this reasoning is the existence of another specific document containing an arbitration clause. It is essential that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other agreements. Before holding that the parties have agreed in writing to refer their dispute to arbitration and in the absence of such a clause in the agreement actually signed by the parties there must at least be a specific contract or document containing such a clause in respect of which it might be said that it had been incorporated in the agreement of the parties by reference.

In *The Annefield* [1971] P 168, Brandon J, (later Lord Brandon of Oakbrook), found the relevant authorities as establishing four propositions. He summarised them as follows (at p 173F–H of the report):

> First, in order to decide whether a clause under a bill of lading incorporates an arbitration clause in a charterparty it is necessary to look at both the precise words in the bill of lading alleged to do the incorporating, and also the precise terms of the arbitration clause in the charterparty alleged to be incorporated.
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> Secondly, it is not necessary, in order to effect incorporation, that the incorporating clause should refer expressly to the arbitration clause. General words may suffice, depending on the terms of the latter clause. Thirdly, when the arbitration clause is, by its terms, applicable only to disputes under the charterparty, general words will not incorporate it into the bill of lading so as to make it applicable to disputes under the contract contained in, or evidenced by, that document. Fourthly, where the arbitration clause by its terms applies both to disputes under the charterparty and to disputes under the bill of lading, general words of incorporation will bring the clause into the bill of lading so as to make it applicable to disputes under that document.

Similarly, in *The Abu Road Electricity & Industries Co Ltd v. Industrial Gases Ltd* 1977 AIR Cal 482 at p 488, Datta J, after a review of the authorities which included the decision in *The Annefield*, said:

> On a review of the above cases the following principles regarding the incorporation of the provisions of one agreement into another agreement appear to have been laid down.
>
> (a) a clause in an earlier contract can be imported into a subsequent contract if the language is appropriate unambiguous and clear.
>
> (b) such clause in the earlier contract can be written in bodily into the later contract if there is no inconsistency or vagueness or uncertainty.
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> (c) a clause in the earlier contract which is germane to the subject-matter of the later contract may be incorporated therein by general words though some degree of manipulation may be involved.

A (d) in respect of a clause in the earlier agreement which is not directly germane to the subject-matter of the later agreement, it is not permissible to construe general words as incorporating such clause therein when the clause in terms does not relate to transactions of such later contract. Such clause can only be incorporated in the later contract by clear words either in the earlier or subsequent contract.

For my part, I would, with respect, enter a caveat in respect of what was said in *The Annefield* and *The Abu Road Electricity & Industries Co Ltd v. Industrial Gases Ltd.* The four principles set out by the learned judges in these two cases are not to be treated as immutable rules carved upon a tablet of stone. They are but guidelines that assist a court when making a determination whether a term ought to be regarded as having been incorporated into a contract by reference to another document.

In my judgment, at the end of the day, whether an incorporation by reference was intended by the parties in a particular case is a question that must be resolved according to the peculiar facts of the individual case. The authorities appear to me to form a spectrum. At one end of that spectrum are cases where no difficulty has been experienced in holding that a term has been incorporated by reference to another document either because of the use of clear and unequivocal language or equally clear implication. *Temperley Steam Shipping Co v. Smyth & Co* [1905] 2 KB 791 was such a case.

[8] In another passage in the same judgment, this court held the following:

But that a term may be incorporated not only by words but also by conduct is illustrated by *British Crane Hire Corp Ltd v. Ipswich Plant Hire Ltd* [1975] QB 303, where it was proved that the hirer of a crane expected that the hire would be subject to certain conditions imposed by the supplier. There had been no course of dealings between the parties. Neither had the terms actually specified by the supplier been drawn to the attention of the hirer before the contract was concluded. Yet, it was held, upon the basis of a common understanding derived from the conduct of the parties, that the suppliers terms had been incorporated into the contract of hire by reference.

[9] The principle then to be distilled from the decided cases is this. Whether a term or a clause in one contract has been incorporated in another depends on the facts and circumstances of each case. There may be express incorporation or incorporation by conduct.

[10] On the facts and circumstances of the present instance we are in agreement with the learned judge that there had been a sufficient incorporation of the sub-contract into the settlement agreement. Section 1.02 of the settlement agreement cannot be any clearer in its terms. It is also to be noted that the recital makes express reference to the sub-contract and the letter of award. It is also to be noted that the same recital acknowledges that the second respondent was acting on behalf of the joint venture comprising of itself and the appellant when it entered into the sub-contract with the first respondent. The arbitration clause in the sub-contract by reason of its incorporation already referred to accordingly binds the appellant. That should really be an end to this appeal. But there is a further point taken by learned counsel for the appellant which we think we are obliged to deal with.

[11] It has been argued by learned counsel for the appellant that the first respondent's case in the arbitration is really directed in its entirety against the second respondent. On the totality of the material before us, it is said, the appellant's responsibility is really one through the ordinary rules of attribution. In other words, what the first respondent is saying is that the appellant is liable not because it did anything wrong but because it is to be held responsible for the acts and omissions of the second respondent. It has been argued that on this basis the arbitration agreement against the appellant is futile because it is for the first respondent to initially prove its case against the second respondent and then to initiate separate legal proceedings to affix the instant appellant with vicarious responsibility for the acts and omissions of the second respondent. With respect we do not agree.

[12] In the first place there is the acknowledgment in s. 1.02 of the recitals to the settlement agreement. In that recital you have an acknowledgment by the appellant that the sub-contract was entered into by the second respondent on behalf of the joint venture to which the appellant was a party. In the second place, there is, we consider, a strong argument of liability through the application of the ordinary principles of agency on the facts and circumstances of this case. Indeed, there is a letter dated 15 May 1998 written by the instant appellant's then-solicitors to the instant first respondent's solicitors in which there is a concession that the instant appellant is a partner of the joint venture.

[13] In *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321, Jemuri Serjan CJ (Borneo) referred to the decision of the New South Wales Court of Appeal in *Brian Pty Ltd v. United Dominions Corp* [1983] 1 NSWLR 490 where Hutley JA said this:

> Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, *inter se*. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v. Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint ventures have fiduciary relationships, inter se would seem to be essential for the efficacy of the device.

[14] If the court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v. Volume Sales (Finance) Pty Ltd* [1974] 131 CLR 321 could on the facts before it conclude that the joint venture there was in essence a partnership there is in our judgment sufficient material on which a similar finding may be made in our case.

[15] For the reasons already given, this appeal cannot succeed. It is dismissed. The appellant must pay the costs of this appeal to the respondents. A word about costs. There has really been only one argument in this appeal from the respondents and it has come from the first respondent. We would therefore direct the taxing registrar to disallow any getting up on the second respondent's bill of costs. However both respondents shall be entitled to out of profit costs and out of pocket expenses. All the orders of the High Court are affirmed and the deposit shall be paid out to the first respondent on account of taxed costs.